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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 512

HIRAM REYNOLDS,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in *Hiram Reynolds v. The Baltimore and Ohio Railroad Company*, 185 F. 2d 27, (C. A. 7, 1950). It will also be found at page 127 of the Record.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 U. S. C., Sec. 1254, 62 Stat. 928.

STATEMENT OF FACTS

In amplification of the Petitioner's Statement of Facts which incorporates by reference paragraph B, page 2 of the Petition for writ of certiorari, attention is called to the fact that the United States Court of Appeals, in reversing the judgment of the District Court, held on an examination of the entire Record, that Petitioner, who drove his auto-

mobile into a locomotive at a railroad grade crossing, was guilty of contributory negligence as a matter of law in failing to see or heed warnings of the existence of the crossing and in failing to so control his automobile that he could bring it to a stop within the range of his vision (R. 132).

SUMMARY OF ARGUMENT

The Court of Appeals correctly decided the case under the law of Indiana in holding that where contributory negligence has been affirmatively proven as a matter of law, a plaintiff is not entitled to judgment.

ARGUMENT

Petitioner, in his brief in support of the Petition for writ of certiorari (2nd paragraph, p. 9 to the Conclusion, p. 13), has undertaken a review of the findings of the Court of Appeals, and to argue therefrom that the Court was in error in holding the Petitioner guilty of contributory negligence as a matter of law. It is submitted that this argument is not addressed to the sole question presented by the Petition (paragraph C, p. 2) and is, in fact, an argument on the merits of the case presented by the entire Record.

In essence, Petitioner's argument upon the question presented rests upon the ground that the Court of Appeals decided the case upon the question of which party has the burden of proof of contributory negligence. This is a repetition of the grounds advanced by the Petitioner in his Petition for re-hearing addressed to the Court of Appeals (R. 137) and rejected by that Court (R. 143). To sustain his position, attention is directed to one sentence in the Court of Appeals' Opinion (R. 130).[1] If this statement had been

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[1] *Reynolds v. The Baltimore and Ohio Railroad Co.*, 185 F. 2d 27, 29.

"Under that law [Indiana], plaintiff as a prerequisite to recovery is required to show that at the time and place of the accident he was

directed to the burden of proof of contributory negligence and the case decided on that ground, Petitioner's position would be well taken. That this was not the view of the Court of Appeals becomes abundantly clear upon a reading of the entire Opinion (R. 127-132).

It is agreed that under the law of Indiana, as in most jurisdictions, the burden of proof of contributory negligence is upon the defendant. *Acts of 1899*, Ch. 41, Sec. 1, p. 58. *Burns Indiana Statutes, 1933*, Sec. 2-1025.[2] It is equally clear that where evidence establishes contributory negligence as a matter of law, a verdict will be directed for the defendant. *Moss v. Pennsylvania Railroad Co.*, 146 F. 2d 673 (C. A. 7), cert. den. 325 U. S. 861 (1945); *Chesapeake & Ohio Railway Co. v. Williams*, 114 Ind. App. 160, 51 N. E. 2d 384 (1943); *Pitcairn et al. v. Honn*, 109 Ind. App. 428, 32 N. E. 2d 733; *Indianapolis Street Railway Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456 (1902).[3]

The plain intent of the statute is that where there is no evidence on the subject of contributory negligence of the plaintiff, the finding of the Court must be against the defen-

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in the exercise of due care and caution for his own safety, or in other words, that he was free from negligence which contributed to cause the accident."

[2] That the provisions of this statute were well known to the Court of Appeals is demonstrated by the fact that Judge Kerner cited the statute in his dissenting opinion in *Moss v. Pennsylvania Railroad Co.*, 146 F. 2d 673 (1945).

[3] In the Indianapolis Street Railway case, decided four years after the passage of the Indiana statute referred to, *supra*, the Court stated, page 279:

"While under said act [Burns Indiana Statutes 1933, 2-1025] the burden of proving contributory negligence of the plaintiff is upon the defendant, yet, if such negligence is shown by the evidence given on behalf of the plaintiff, it is as effective as if proved by the defendant; and there can be no recovery in such case. This being true, if it affirmatively appeared from the evidence that appellee was guilty of contributory negligence, it was not material who had the burden of proof; * * *."

dant on that issue because the defendant has the burden of proof. If, however, there is no dispute as to the controlling facts or inferences to be drawn therefrom, then the question of contributory negligence becomes a matter of law for the Court. *Lake Erie and Western Railroad Co. v. McFarren,* 188 Ind. 113, 122 N. E. 330 (1919). Once evidence of contributory negligence has been established in a case, whether by the plaintiff or defendant, the statute here invoked, relating as it does to the burden of proof, no longer controls the determination of the issue of plaintiff's contributory negligence. The Court is then free to determine from the facts and the inferences to be drawn therefrom the question of plaintiff's guilt of contributory negligence as a matter of law. *Indianapolis Street Railway Co. v. Taylor,* 158 Ind. 274, 63 N. E. 456 (1902).

The Court of Appeals not only did not decide the case on the question of burden of proof, but has been meticulous in following the law of Indiana in according to the Petitioner every presumption and inference favorable to his cause, yet has reached the conclusion, based upon positive testimony, that he was guilty of contributory negligence as a matter of law (R. 132).[4]

For the aforegoing reasons, we submit that the decision of the Court of Appeals is in conformity with the law of the State of Indiana.

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[4] *Reynolds v. The Baltimore and Ohio Railroad Co.,* 185 F. 2d 27, 30.

"Because of the serious injuries sustained by the plaintiff, we have examined the whole record taking as true all the facts favorable to the plaintiff and drawing all inferences which might reasonably be drawn against the defendant. From such examination we are convinced that, under the facts and circumstances disclosed in this record, plaintiff's failure to see and heed the warnings that a railroad crossing existed a short distance ahead on his line of travel, together with his failure to so operate and control his automobile that he could bring it to a stop within the range of his vision, constituted negligence as a matter of law."

CONCLUSION

As the Court of Appeals' reference to the law of Indiana governing negligence of a party plaintiff was not intended to relate to the question of burden of proof which was not decisive of the issue, and as its decision was based upon positive evidence of contributory negligence, it is respectfully submitted that the judgment of that Court was correct and, accordingly, this Court should deny its writ of certiorari to review the same.

Respectfully submitted,

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February, 1951